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Jonathan Miller
Secretary

September 10, 2010

No. 10-24

Amy D. Cubbage
John S. Egan
Frost Brown Todd LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202-3363

RE: Determination of Protest: RFP 758 0800001577 (Electronic Payment Transactions and E-Messaging Service).

Dear Ms. Cubbage:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest to the award of RFP 758 0800001577 for Electronic Payment Transactions and E-Messaging Service (the "RFP"). In the protest you contend that the proposal of Keefe Commissary Network ("Keefe") was not properly considered. For the reasons stated herein, this protest is sustained.

FACTUAL BACKGROUND

The Finance Cabinet Office of Procurement Services ("OPS") issued the RFP on November 6, 2008, on behalf of the Kentucky Department of Corrections ("KYDOC"). The RFP consisted of two sections; (1) the Technical Proposal and (2) the Cost Proposal. In addition, the Commonwealth could, and did, require an Oral Presentation. 1435 points were available for the Technical Proposal. RFP, Section 60.050. 570 points were available for the Cost Proposal. RFP, Section 70.010. 500 points were available for the Oral Presentation. RFP, Section 80.020.

The evaluation of the Cost Proposal was to be conducted as follows:

Section 70—Cost Proposal Evaluation

All cost must be detailed and submitted in accordance with Section 50 of this RFP. KYDOC will not pay for any additional items and/or services whether omitted intentionally or unintentionally from the Cost Proposal Form. Any part of the solution not priced separately will be assumed included in the base cost.

Section 70.000—Service Fee Proposal Evaluation

Fees will be evaluated by service type. The bidder with the lowest service fee(s) will receive the maximum score. The bidder with the next lowest fee(s) will receive points based on rank order.

Commission Fees paid to KYDOC. KYDOC seeks a means to offset limited internal costs incurring from administering these programs. The bidder with the best commission rate will receive the highest score in this category.

Section 70.010— Fee Scoring Criteria

Vendors shall provide their service fee(s) schedule on Attachment B otherwise the proposal may be deemed non-responsive.

The three highest ranked vendors were invited to give oral presentations. RFP, Section 80.020. The RFP closed on January 7, 2009. Three offerors submitted proposals: JPay, Inc. ("JPay"), Keefe, and Western Union Financial Services, Inc. ("Western Union").

After the evaluation of the Cost Proposals, all three offerors were awarded the maximum points of 570. The Technical Proposals were scored as follows: JPay – 1350 points; Keefe – 1,140 points; Western Union 1,150 points. The Oral Presentations were scored as follows: JPay – 458 points; Keefe – 380 points; Western Union – 319 points. The total scores were: JPay – 2,378 points; Keefe – 2,090 points; Western Union – 2,039 points. OPS issued an award to JPay on July 6, 2010.

Keefe filed a written protest on July 19, 2010. JPay submitted a written response by letter dated August 4, 2010. On August 10, 2010, OPS filed its response.

DETERMINATION

After a review of the solicitation, the solicitation responses, the official findings, the applicable statutes and regulations, and other relevant information, the Secretary of the Finance and Administration Cabinet ("Secretary") finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary. KRS 45A.285. Keefe was an actual offeror to the RFP so Keefe has standing to protest the award.

A protest to an award must be made within two (2) calendar weeks within the date the protestor knew or should have known of the grounds for protest. KRS 45A.285. In this case, the award to JPay was made on July 6, 2010. The written protest was received on July 19th. The Secretary finds that the protest was filed within 2 calendar weeks of the date the protestor knew or should have known of the grounds for protest. This protest, accordingly, is timely.

The protester bears the burden of proof. See *Matter of: American Identification Products, Inc.*, 87-2 CPD ¶42 (Comp.Gen 1987) (“protester has burden of demonstrating the merits of its case.”); *GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 782-83 (Fed.Cl. 1997); *CRC Marine Servs., Inc. v. United States*, 41 Fed.Cl. 66, 83 (1998). The burden is not met by the protester's mere disagreement with the agency's determination. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). Moreover, a determination by an agency is entitled to a presumption of correctness. KRS 45A.280. The protestor must demonstrate the agency's action was arbitrary, capricious, or contrary to law. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). The Secretary will only intervene only when it is clear that the agency's determination was irrational or unreasonable. *Baird Corp. v. United States*, 1 Cl.Ct. 662, 664 (1983). An “alternative interpretation” of the terms of the solicitation will not establish an arbitrary or capricious determination. *Laboratory Corporation of America v. Rudolph*, 184 S.W.3d 68, 74 (Ky. App. 2006). In sum, the Secretary will not substitute his judgment on such matters reserved to the discretion of the agency. See *Laboratory Corp. of America Holdings v. Rudolph*, 4 S.W.3d 68, 75 (Ky.App. 2005) (award of a negotiated procurement is a discretionary act by an agency); *Hensley v. City of Russell*, 2006 WL 2988174 (award of a public contract is a purely discretionary act). Further, it is a well-settled rule that the solicitation should inform all offerors of the basis for evaluation of proposals and the evaluation must, in fact, be based on the scheme set forth in the solicitation. *Human Resources Research Organization*, B-203302, 82-2 CPD P31 (Comp. Gen. July 8, 1982). Yet, agency decisions are entitled to a presumption of correctness. KRS 45A.280.

In addition to showing that the agency's action was arbitrary or capricious or otherwise inconsistent with law, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) (“[T]o prevail in a protest the protester must show not only a significant error in the procurement process, but also that the error prejudiced it.”). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

Accordingly, the Secretary will review the agency's determination to determine whether there was a rational basis for its evaluation and whether the evaluation was consistent with applicable law. If the Secretary finds error, the Secretary will then examine whether the error was prejudicial to the protestor.

In its letter of protest, Keefe asserts that its Cost Proposal, the Technical Proposal, and Oral Presentation were mistakenly evaluated. In specific, Keefe argues:

1. Keefe proposed lower service fees and higher commission rates to the Commonwealth than JPay but both received identical cost proposal scores;
2. The Commonwealth's Technical Evaluation (Consensus Scoring) of Keefe does not accurately reflect the actual scoring given to Keefe; and
3. The Oral Evaluations (Consensus Scoring) for JPay and Keefe reflect arbitrary and inconsistent scoring.

I. Keefe proposed lower service fees and higher commission rates to the Commonwealth than JPay but both received identical cost proposal scores.

Keefe's first ground of protest is stated as follows:

Keefe proposed lower service fees and higher commission rates to the Commonwealth than JPay but both received identical cost proposal scores. Although Keefe proposed substantially lower service fees and higher commission rates to the Commonwealth than JPay, Keefe and JPay received identical cost proposal scores of 570 points in the Determination and Finding. See Exhibit E. This scoring method is in direct violation of the scoring instructions stated in the RFP, resulting in JPay receiving a higher score than it should have in the cost proposal category.

...

Keefe proposed both lower service fees and higher commission fees than JPay for identical services. Therefore, under the RFP's standards, the evaluation committee should have awarded Keefe a higher score than JPay in the cost proposal category. It did not.

...

A comparison of the Keefe and JPay tables reveals that either (i) Keefe's actual proposed service fees for these identical services (not counting the commission rates which JPay's tables do not provide for) are \$1.00 less than JPay's in each instance or (ii) Keefe and JPay's proposed service fees are basically the same, but in each instance the Department of Corrections would receive an additional \$1.00 commission for each service provided by Keefe. Thus, review of identical services proposed by Keefe and JPay reveal that in each instance, Keefe's proposed fees are lower and its commission rates higher than JPay's. The higher commission rates of Keefe represent substantial additional moneys to the Department of Corrections in a time of budget austerity and shortfalls. Such additional moneys could result in hundreds of thousands of dollars in additional revenues to the Department of Corrections over the life of the contract. Despite these discrepancies, both Keefe and JPay received the maximum score of 570 in the cost proposal category of the Determination and Finding. The cost evaluation scoring table is attached as Exhibit F. Such scoring is directly in contradiction of the RFP's instructions to award more points to a bidder for having lower service fees and better commission rates.

To Keefe's assertion, JPay responds:

Pursuant to the RFP (Section 70.000 — Service Fee Proposal Evaluation), the bidder with the lowest service fees will receive the maximum score. Understanding that this RFP requested pricing for two unique services, electronic payments and e-messaging, each with an array of pricing options, the Commonwealth chose to evaluate the bidders on the lowest cumulative pricing for Internet and telephone payments. As a result, all three bidders (Pay, Keefe and Western Union) proposed the same cumulative low service fees and as a result, the Commonwealth gave each bidder the maximum score.

OPS states:

JPay and Western Union did not propose a commission rate as required in the RFP instructions, however Keefe submitted both the commission rates and the fees. The evaluation was only based on the fees and not the commission rates as instructed in the RFP. Therefore the evaluation and scoring for the cost is inaccurate.

A review of the RFP and the responses and the resulting contract shows that JPay did not include a commission in its pricing. The solicitation must inform all offerors of the basis for evaluation of proposals and the evaluation must, in fact, be based on the scheme set forth in the solicitation. *Human Resources Research Organization*, B-203302, 82-2 CPD P31 (Comp. Gen. July 8, 1982). In this case, the evaluation was not conducted in accordance with the RFP. The Secretary, therefore, finds that the scoring was conducted in an arbitrary and capricious manner. The protest on this ground has merit.

II. The Commonwealth's Technical Evaluation (Consensus Scoring) of Keefe does not accurately reflect the actual scoring given to Keefe.

In its letter of protest, Keefe contends:

The Commonwealth's Technical Evaluation (Consensus Scoring) of Keefe, which is attached as Exhibit G, does not accurately reflect the actual scoring given to Keefe, in the "References" category. The actual scoring sheet for JPay, Keefe and Western Union for the "references" category is attached as Exhibit H. The actual scoring sheet shows a total of 80 points for each of JPay, Keefe and Western Union for references (it appears that because it was scored by one scorer only, her scores were multiplied by 4 to be consistent with the other respondents, who were evaluated by four scorers each). The Technical Evaluation (Consensus Scoring) of Keefe, however, only reflects a score of 20 points in this category (which is 60 points lower than the score should have been). The Technical Evaluation (Consensus Scoring) of Keefe is inaccurate and arbitrary with respect to the "references" category.

In response, JPay states:

The Commonwealth's technical evaluation (consensus scoring) of Keefe does in fact accurately reflect the actual scoring given to Keefe. As it clearly states in Keefe's Technical Evaluation (Consensus Scoring), References (Section 60.030), Notes:

"Email addresses for three (3) references were not included as part of the RFP response. Multiple attempts were made to contact the references to obtain email address or fax numbers; however, results were unsuccessful."

As a result, Keefe was only awarded 20 points out of a possible 80 points since only 1 out of the 4 possible references was contacted.

OPS asserts:

Pursuant to the RFP, Section 60.030, References, "The Vendor shall provide reference information on each reference using Attachment A. The Vendor shall submit a total of four (4) references." Both JPay and Western Union submitted the required four (4) references. All references responded to the reference questionnaire that was sent and received by the buyer. Each reference was worth 20 points each, thus the 80 total points for both of these vendors (20x4=80). Keefe submitted four (4) references, however only one (1) reference was valid and scored, thus the 20 points. Email addresses for the other three (3) references were not included as part of the RFP response per Section 60.030, "References' telephone number and email address shall be included on the reference form otherwise the reference may receive a score of zero (0). If the reference does not have an email address, please state such on the reference form." The buyer made multiple attempts to contact the references to obtain email addresses or fax numbers; however, results were unsuccessful. Therefore, the one (1) reference was scored and Keefe received 20 out of 80 total points for the reference section of the RFP.

The Evaluation Committees scoring of the references provided by Keefe was in accordance with the RFP. Accordingly, the Secretary finds that evaluation was not arbitrary, capricious, or contrary to law. Keefe's second ground of protest has no merit.

III. The Oral Evaluations (Consensus Scoring) for JPay and Keefe reflect arbitrary and inconsistent scoring.

For its third ground of protest, Keefe argues:

The Oral Evaluation Consensus Scoring for JPay, which is attached as Exhibit I, and the Oral Evaluation Consensus Scoring for Keefe, which is attached as Exhibit J, reflect arbitrary and inconsistent scoring of the two bidders in the following areas:

"Discuss how DOC staff will manage, monitor and audit the services." The Notes/Comments for JPay and Keefe reflect essentially the same responses by each, yet JPay was awarded 45 points and Keefe was awarded 36 points.

"Please discuss your implementation plan in two parts." The Notes/Comments for JPay and Keefe reflect essentially the same responses by each, yet JPay was awarded 42 points and Keefe was awarded 30 points.

"Please demonstrate the reporting of the daily ACH batches for institutions...." The Notes/Comments for JPay and Keefe reflect essentially the same responses

by each, yet JPay was awarded 45 points and Keefe was awarded 36 points. "Please demonstrate the software used for institutions to identify deposits....." The Notes/Comments for JPay and Keefe reflect essentially the same responses by each, yet JPay was awarded 44 points and Keefe was awarded 33 points.

JPay responds:

Keefe cites differences in scores awarded for certain evaluation criteria because the notes/comments have similar wording. Keefe was simply not in attendance at JPay's Oral Evaluation. Any claims regarding JPay's Oral Presentation are baseless and cannot be considered valid. Pursuant to KRS 45A.280: The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

OPS contends:

Keefe is correct in this regard. The Notes/Comments are similar in nature, however the scoring is not. Although scoring was based on the consensus scoring method, the evaluators were not consistent in their justification for such scoring in the above referenced areas.

The Secretary finds that the Notes/Comments are similar for many of the Oral Presentation Evaluation Criteria for both JPay and Keefe. The scoring for these Evaluation Criteria was different. There is a presumption of correctness in the Determination. KRS 45A.280. The Secretary finds that the fact that similar (but not identical) Notes/Comments were scored differently does not establish an arbitrary or capricious Determination. This third ground of protest is without merit.

In addition to showing that the agency's action was arbitrary or capricious or otherwise inconsistent with law, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) ("[T]o prevail in a protest the protester must show not only a significant error in the procurement process, but also that the error prejudiced it."). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

Keefe has demonstrated that there was an error in the evaluation of the Cost Proposals. Keefe submitted the lowest total Cost Proposal. The Secretary finds that the Cost Proposal of JPay was not complete as required by the RFP. Further, had the evaluation been conducted in accordance with the RFP, there is a likelihood that Keefe would have been awarded the contract. Keefe, therefore, has established a significant error in the evaluation of the RFP and prejudice.

Accordingly, upon review of the record, Keefe has demonstrated an error in the procurement and prejudice. The protest, therefore, must be **SUSTAINED**. The Finance Cabinet Office of Procurement Services is directed to rescind the award to JPay. OPS is directed to re-issue the RFP or to cancel the RFP and issue a new RFP or to implement some other action consistent with this Determination. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by Finance Cabinet shall be final and conclusive.

For the Secretary
Finance and Administration Cabinet
By Designation



Robin Kinney
Executive Director
Office of Administrative Services

cc: Stephanie Williams, OPS
Errol Feldman, JPay